No. 2572

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

G. J. BUCHLER, *Appellant,*

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING COMPANY, a Corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

O. C. MOORE,
Solicitor and Counsel for Complainant,
501 Peyton Building, Spokane, Washington.

GEORGE H. WALKER,
Solicitor and Counsel for Complainant,
705-6-7 Central Bldg., Seattle, Washington.

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STATEMENT OF CASE.

The Appellant, G. J. Buchler, Complainant below, a stockholder in the Sunset Copper Mining Company, instituted and maintains this suit on behalf of himself and other stockholders. The bill of complaint was filed and subpoena issued on March 26th, 1912 (Tr. 20). Appellee Sunset Copper Mining Company, which for convenience will be referred to as "The Company," is a cor-

poration organized under the laws of Washington with its principal place of business at the town of Everett and was the owner of certain mining properties in said State. Appellees Black and Bell jointly purchased, at the hereinafter described judicial sale, and are now the paper owners of the assets of The Company, here in controversy. Black was Judge of the Superior Court of Washington for Snohomish County during the period covered by this controversy (Tr. 99, 105) and he was likewise, during said period, a trustee and general manager of The Company (Tr. 99). The majority of the trustees of The Company lived at Glenn Falls, New York, though The Company had never complied with the laws of New York respecting foreign corporations doing business in that State (Tr. 71, 72).

During the years 1904 and 1905, the Company executed two mortgages on its mining properties in favor of one, Ella Baldwin, of Glenn Falls, New York, for the sum of $29,384.10, which were subsequently transferred to Bell.

On November 30th, 1908, Respondent Bell caused a summons and complaint for the foreclosure of said mortgages, so held by him, to be served on H. C. McNutt, the President of The Company in the State of New York, and the complaint and summons were filed in the office of the Clerk of the Superior Court of Washington

for Snohomish County on December 9th, 1908 (Tr. 114, 119). The summons, so served, is in the form prescribed by the statutes of Washington for personal service within the State and required an appearance within twenty days after service (part of Plaintiff's Exhibit "B"; Tr. 114). The complaint in this suit (Tr. 115), in addition to asking for the foreclosure of said mortgages, alleges insolvency on the part of The Company and prays for the appointment of a receiver. On the date of the service of said summons and complaint, a notice was also served on said McNutt in the State of New York to the effect that an application for the appointment of a receiver for The Company would be made at the hour of 9:30 o'clock A. M. on the 9th day of December, 1908 (Tr. 121). Said McNutt assumed to acknowledge "Due and timely service" of both summons and complaint and notice (Tr. 119, 121). There was no pretense of an appearance in said cause on behalf of The Company until January 30th, 1909 (part of Plaintiff's Exhibit "B"; Tr. 130; Testimony of D. W. Locke, Tr. 96). Notwithstanding the date, December 9th, designated in the notice, no proceedings were had at that time, though on the following day, December 10th, 1908, an *ex parte* order was made and entered in said Superior Court, appointing one John B. Fogarty, as temporary receiver of the assets of The Company (Tr. 125). In these and all subsequent proceedings in said case Bell

was represented by one John Sandidge, who testified that he was selected and retained for that purpose by Black (Tr. 93, 94), and receiver Fogarty testified that he likewise owed his appointment to Black (Tr. 97).

After the appointment of the temporary receiver Black procured one D. W. Locke to enter an appearance as attorney on behalf of The Company (Tr. 96), and though, according to his testimony, he was advised by Black and was satisfied from his own investigations that there was no defense available in the foreclosure suit, he subsequently, on January 30th, 1909, the day the final decree was rendered, entered an appearance as Attorney for The Company (part of Plaintiff's Exhibit "B"; Tr. 130). No defense of any kind was made or attempted by Locke on behalf of The Company and no other appearance was made by him in the case than the one just indicated (Tr. 96). On the date of this appearance, January 30th, 1909, a Judge *Pro Tempore,* selected and appointed by Black (Tr. 96), entered an order and decree continuing the temporary receiver as permanent receiver of The Company and directing that no new or additional bond should be given by said receiver, but that the bond theretofore given by him as temporary receiver should be continued and remain in force as his bond as permanent receiver. By the same decree Bell was awarded

judgment in accordance with the prayer of his complaint for the sum of $37,501.75, together with his costs (Tr. 132, 133).

Though brought for the foreclosure of a mortgage, that phase of the suit was entirely abandoned by Bell, and the receiver proceeded to a sale of the mortgaged property of The Company, without regard to the mortgage. Notice was given to creditors and the report of the receiver shows, among other claims allowed, one presented by Black for the sum of $10,923.21, and another by Bell for the sum of $12,767.57, the latter being the amount of a judgment obtained by Bell against The Company in the United States Court for the Northern District of New York by default on purported service made on its president in the State of New York, though said corporation admittedly had not complied with the laws of New York respecting foreign corporations (Tr. 71, 72). By further order of court (Tr. 145) the assets of The Company, consisting of certain mining claims described in the Complaint, were sold by the receiver to Black and Bell on March 20th, 1909, for the sum of $40,000, two per cent of which is reported to have been in cash, as required by the order of sale (Tr. 155). Objections to the confirmation of the receiver's sale were filed by one Nicholas Rudebeck and one L. T. Reid, stockholders in The Company. These objections were overruled and the sale was confirmed on April

5th, 1909 (Tr. 165). No final report was filed by the receiver, nor were further proceedings of any kind had in said cause subsequent to the confirmation of said sale.

The complaint alleges that the entire proceedings leading up to the receiver's sale were in pursuance of a collusive and fraudulent understanding between Bell and Black. It is alleged in paragraph 16 of the Complaint (Tr. 11), admitted in paragraph 11 of Black's Answer (Tr. 32), and the record establishes that no less than three outside judges were called in by Black to sign various orders at different stages in the proceedings and, as above stated, the order appointing a permanent receiver and awarding judgment to Bell was made by a Judge *Pro Tempore* appointed by Black. The record also shows that of these different judges, apparently called pursuant to a definite plan to pass upon each different phase of the case, no judge participated a second time in any phase of the proceedings.

The foregoing statement is based on the admissions of the answers of Bell and Black (no appearance having been made in this suit on the part of The Company) and on the undisputed evidence adduced at the trial.

The bill of complaint prays, among other things, that Black and Bell "be declared to be trustees

for and on behalf of the said corporation and its stockholders, and be declared to hold all of the said property as trustees for the use and benefit of said corporation, for its *bona fide* creditors and stockholders." It also prays for the appointment of a receiver to wind up the affairs of The Company to the end that equity may be done between all parties.

In support of this prayer it was urged, among other contentions, on behalf of appellant in the lower court:

FIRST: That the Superior Court of Washington was without jurisdiction of the proceedings had in the foreclosure suit brought by Bell which resulted in the sale by a receiver of the property of The Company to Black and Bell:

(A) That The Company was never legally served with process.

(B) That the purported appearance on its behalf by Attorney D. W. Locke was unauthorized and fraudulent.

(C) That, the suit of Bell vs. The Company being primarily for the foreclosure of a mortgage, the court was powerless to authorize therein a sale of The Company's property by the receiver.

(D) That the receiver's sale was void, for the

further reason that he had not qualified by furnishing a bond as required by law.

SECOND: That since Black was a trustee and the general manager of The Company it was not permissible for him to hold adversely the property of The Company so purchased by him at a judicial sale.

These contentions were rejected by the trial court and in a written opinion, filed subsequent to the trial (Tr. 75), the court, specifically passing on the following points without referring to other questions involved, held:

FIRST: That Black was not precluded by reason of his relation with The Company, as trustee and general manager, from purchasing and holding adversely the property in question (Tr. 81).

SECOND: That there was no evidence of collusion between Black and Bell or that either of them exercised any undue or improper influence in any of the proceedings referred to in the complaint, and that the proceedings in the case of Bell vs. The Company leading up to the receiver's sale were regular and valid.

THIRD: That the order overruling the objections, filed by the stockholders, Rudebeck and Reid,

to the confirmation of the receiver's sale was *res judicata* of this suit (Tr. 85).

FIFTH: That the granting of the relief here sought would amount in effect to the setting aside of a judgment of the State Court, which relief a Federal Court would be powerless to grant.

SIXTH: That appellant was chargeable with laches and thereby precluded and barred from maintaining this suit.

A petition for a rehearing, filed by appellant, having been denied (Tr. 92), a final decree of dismissal was entered (Tr. 88). This appeal is prosecuted from said final decree.

ASSIGNMENTS OF ERROR.

Appellant has specified the following errors which he believes to have been committed by the trial court in rendering and entering the decree appealed from:

1. The court erred in holding that there was no evidence before it of any collusion between the defendants Black and Bell with relation to the conduct of the business of defendant company.

2. The court erred in holding that there was no evidence before it to justify the conclusion that either defendants Black or Bell exercised any un-

due influence of any character in any of the proceedings referred to in the complaint.

3. The court erred in holding that there was no evidence before it that any information with relation to the conditions or status of defendant company's property was at any time withheld from the plaintiff.

4. The court erred in holding that the plaintiff was guilty of laches and was thereby precluded and barred from maintaining this suit.

5. The court erred in holding that the action of the State Court in approving the claims filed with the receiver by defendants Black and Bell over the objection of a minority stockholder, other than the plaintiff herein, is *res judicata* of this suit.

6, The court erred in holding that the confirmation of the receiver's sale of the assets of the defendant company over the objection of a minority stockholder, other than the plaintiff herein, is *res adjudicata* of this suit.

7. The court erred in refusing to hold defendants Black and Bell, or either of them, as trustees of the property of defendant corporation bid in by them at the receiver's sale, for the use and benefit of said corporation and its stockholders.

8. The court erred in holding valid the pro-

ceedings had in the suit brought by defendant Frank L. Bell in the Superior Court of Washington for Snohomish County against the Sunset Copper Mining Company, wherein the assets of said company were sold by the receiver under order of court and purchased by defendants Frank L. Bell and W. W. Black.

9. The court erred in holding valid the receiver's sale of the assets of defendant corporation had in the foreclosure suit brought by defendant Bell in the Superior Court of Washington for Snohomish County.

10. The court erred in holding that the evidence introduced at the trial on behalf of complainant was insufficient to entitle complainant to any relief.

11. The court erred in holding that complainant's bill was without substantial equity and in dismissing the same and denying the relief therein prayed for.

12. The court erred in denying complainant's petition for a rehearing.

ARGUMENT.

I.

SUPERIOR COURT OF WASHINGTON ACQUIRED NO JURISDICTION IN CASE OF BELL VS. SUNSET COPPER MINING COMPANY, HENCE PROCEEDING THEREIN A NULLITY.

It is familiar law that the jurisdiction of the court by which a judgment is rendered is open to inquiry in any collateral proceeding where such judgment is relied upon or called into question. If on such inquiry it be found that the court acted either without jurisdiction of the parties, the subject matter, or power to render the particular judgment, or that an apparent jurisdiction was conferred through fraud, the judgment, so rendered, will be held absolutely void and without force or effect.

Thompson vs. Whitman, 85 U. S. 457.
Webster vs. Reid, 11 Howard, 433.
Christman vs. Russell, 5 Wallace, 290.
Elliot vs. Peirsol, 1 Peters, 328, 340.
Johnson vs. North Star Lumber Co. (9 Cir.), 206 Fed. 175.
Foster vs. Milburn, 207 Fed. 175.
German Savings & Loan Society vs. Dormitzer, 192 U. S. 125.

(A) In discussing this question, we shall first devote ourselves to showing that no process was ever legally served on The Company in the proceeding brought by Bell wherein its property was sold to the appellees.

The record conclusively establishes, nor is it denied, that the only pretense of service of process had in said case was that made upon the president of The Company in the State of New York, in which state The Company was not doing business and with the laws of which, concerning foreign corporations, it had not complied (Tr. 119, 120, 121). Why service should have been attempted in this manner when Black, a trustee and the general manager of The Company, resided in Washington is not explained, but had the corporation had no agent within the State of Washington such service would have been void in any event, since Section 227 of Rem. & Bal. Codes and Statutes of Washington provides:

> "Whenever any corporation, created by the laws of this state, or late territory of Washington, does not have an officer in this state upon whom legal service of process can be made, an action or proceeding against such corporation may be commenced in any county where the cause of action may arise, or said corporation may have property, and service may be made upon such corporation by depositing a copy of the summons, writ, or other process, in the office of the secretary of state.

> which shall be taken, deemed and treated as personal service on such corporation."

It is entirely clear, from the above quoted statutes and on the most familiar principles of law, Pennoyer vs. Neff, 95 N. S. 714, that valid service on a Washington corporation cannot be acquired by the service of process on one of its officers sojourning in a sister state, even though such corporation has no officer in the State of Washington and has complied with the laws of the foreign state, which was not true in the present instance. Again the summons served in the present instance, which required an appearance within twenty instead of sixty days after service (Tr. 114) would be ineffective for any purpose when served outside the state, since the statutes of Washington provide a sixty-day period for appearances where service, in a proper case, is made outside of the state. Section 234 of Rem. & Bal. Codes and Statutes of Washington is as follows:

> "Personal service on the defendant out of the state shall be equivalent to service by publication, and the summons upon the defendant out of the state shall contain the same as personal summons within the state, except it shall require the defendant to appear and answer within sixty days after such personal service out of the state."

It will hardly be contended, we assume, that the acknowledgment of service endorsed on the summons by the president of The Company at the time same was served upon him, had or was intended to have any other purpose or effect than that of cumulative evidence in support of the return of the process server. Obviously, it could not be successfully contended that the president of a corporation would have authority, even though it were his intention to, by such an endorsement, waive objection to the service of a defective and insufficient summons, prescribing a time for appearance much shorter than that provided by statute, so as to permit the entry of a valid default judgment because of failure to appear within the time required by such summons. Especially would the officer of a corporation have no such power or authority where, as in this case, the service was made in a foreign state, on the opposite side of the continent, some three thousand miles beyond the jurisdiction of the court by which the judgment in question was entered.

The pretended service of process on the president of The Company in the State of New York was ineffectual for any purpose:

(1) Because the process served required an appearance within twenty days instead of sixty days as required by the statutes of Washington where service is made outside the state.

(2) Because the service of process on an officer of a Washington corporation, sojourning in a foreign state, is not permitted, under any circumstances, by the statutes of Washington above quoted.

These propositions are, it seems to us, too obvious to justify further argument.

(B) That Black, who had employed Attorney Sandidge to represent the plaintiff (Tr. 93), deemed it necessary to thereafter retain Attorney Locke to enter an appearance on behalf of the defendant company (Tr. 95) renders it evident that Black and Bell fully appreciated that no jurisdiction was conferred on the Washington court by the pretended service of process had on the president of The Company in the State of New York. Attorney Sandidge testified:

> "My recollection is that Judge Black said the corporation had no defense to the foreclosure suit and I knew of no defense to the foreclosure or to the appointment of a receiver. There was no suggestion that a defense could be made, except what is made in the record itself." (Tr. 94.)

Respecting the circumstances of his employment to represent Bell and the activities of Black on Bell's behalf, Attorney Sandidge further testified:

> "The matter of my representing the plaintiff in said suit was first mentioned to me by

> Judge W. W. Black. He told me that Mr. Bell contemplated such an action and that he had recommended to him that he employ me in the matter, and I think he told me that Mr. Bell would prepare and serve the complaint in New York and then forward it out here to Everett. This was subsequently done and I took charge of the case from that time on and looked after it as an attorney. I could not say without seeing the records just what papers I prepared in the case. Mr. Bell, according to my recollection came to my office and dictated some affidavits, and Judge Black dictated an affidavit that he made. During the course of the proceedings I talked the case over a number of times with Judge Black and generally discussed all steps of importance in the case with him. The defendant corporation was represented by W. D. Locke. My recollection is that there was no answer filed in the case and I do not recall that there was any issue made between Mr. Locke and myself. I think I discussed the claims filed by the creditors with Judge Black, and, while he said there were some claims that were not just, he did not personally care to object to them. My recollection is that there was no contest about any of the claims between myself and the attorney for the corporation." (Tr. 94.)

Notwithstanding, Judge Black had stated that no defense was available in the foreclosure suit, and notwithstanding that after investigation he arrived, according to his testimony, at the same conclusion (Tr. 95), and notwithstanding the fact that no valid or sufficient service of process had

been made on The Company, Attorney Locke, on January 30th, 1909, on behalf of The Company, whose interests he claimed to represent, entered an appearance as attorney for The Company, at the same time stipulating for the appointment of a judge *pro tempore* before whom, he also agreed that the case might be finally heard at 10 o'clock A. M. of the same day. On the same paper and as part of the same document appears the signature of Judge Black approving the stipulation by Sandidge and Locke for the appointment of one F. E. Anderson to preside as judge *pro tempore* at said trial.

Concerning the selection and appointment of a judge *pro tempore* Section 40 of Rem. & Bal. Codes and Statutes of Washington provides:

> "A case in the Superior Court of any county may be tried by a judge *pro tempore,* who must be a member of the bar, agreed upon in writing by the parties litigant or their attorneys of record."

In the face of the above statute, the undisputed testimony of Attorney Locke shows that he acted not at all on his own judgment in the matter but deferred in the first instance entirely to the wishes of Judge Black in stipulating for the appointment of a judge *pro tempore,* so that said stipulation is a mere record of the desires of Black expressed through the signatures of the attorneys by which

it was signed. On this point Attorney Locke testified:

> "I think I deferred to the wishes of my client, Judge Black, as to who the judge *pro tem.* should be. Judge Black suggested that Mr. Anderson be appointed and that was agreed upon." (Tr. 96.)

Thus we have the trinity composed of W. W. Black, Judge of the Superior Court. John Sandidge, selected by Black as attorney for plaintiff, and D. W. Locke, likewise selected by Black as attorney for the defendant, appearing of record on a single document in a co-operative and concentered effort to weave and perfect a judicial web around and about the intangible and alleged insolvent entity known as the Sunset Copper Mining Company, which would be sufficient to resist future attack from its stockholders and creditors. For the convenience of the court we reproduce said document herewith as same appears at page 130 of the Tr., to-wit:

> "In the Superior Court of the State of Washington, in and for the County of Snohomish.
>
> Frank L. Bell, Plaintiff,
> vs.
> Sunset Copper Mining Company, a Corporation, Defendant.
>
> No. .....

APPEARANCE AND STIPULATION.

I, D. W. Locke, do hereby enter by appearance as attorney for the above named defendant, having been duly authorized to appear as such attorney, and hereby consent that the above case may be tried on January 30th, 1909, at 10 o'clock A. M. of said day, or as soon thereafter as same may be reached.

D. W. LOCKE,

Attorney for Defendant.

It is hereby stipulated by and between the said plaintiff and the said defendant that the above entitled action may be tried before F. E. Anderson as judge *pro tempore,* and that said case may be tried before F. E. Anderson as judge *pro tem.* on the 30th day of January, 1909, at the county court house in Everett, Washington, at ten o'clock A. M. of said day or as soon thereafter as same can be reached.

JOHN SANDIDGE,

Attorney for Plaintiff.

D. W. LOCKE,

Attorney for Defendant.

The foregoing stipulation that F. E. Anderson shall try the above cause as judge *pro tem.,* is hereby approved.

W. W. BLACK, Judge.

Filed: Jan. 30th, 1909.

JOHN R. DALLY, County Clerk."

Here then is presented the remarkable spectacle of what is paraded as a judicial proceeding before a judge *pro tempore* selected, not by the attorneys for the respective parties, as required by statute, but by the regular presiding judge of said court who had theretofore selected and retained the attorney appearing for the plaintiff and who had likewise selected and retained an attorney to appear for the defendant for the sole purpose of conferring jurisdiction on the court, said regular judge being himself the local legal representative and general manager of the defending corporation and the subsequent beneficiary of the proceedings had before said judge *pro tempore*. Nor is this all, but the product of this thoughtfully devised and carefully constructed judicial system was the appointment without opposition as receiver of the defendant corporation of the man who had also been selected for that position by the same master mind, W. W. Black, Judge of the Superior Court of Washington for Snohomish County and a trustee and the general manager of the defendant, Sunset Copper Mining Company. As to how he came to be appointed receiver Fogarty testified as follows:

> "The first suggestion of my becoming the receiver was made to me by Judge Black, who asked me if I would serve if appointed and I told him I would." (Tr. 97.)

It should also be borne in mind that after thus connecting up the record and conferring apparent jurisdiction on the court to enter what was obviously thought to be an unassailable judgment, Attorney Locke dropped entirely from view and took no further part in the proceedings. On this point he testified:

> "Q. Examine page 18 of Plaintiff's Exhibit B which I now hand you, being a transcript of the records and files in the case of Bell against Sunset Copper Mining Company in Snohomish County. Have you read it?
>
> A. Yes, I have read it.
>
> Q. Now, is it not true that the appearance indicated on this page 18 is the only appearance you ever made in the case?
>
> A. I only made one appearance in the case." (Tr. 96.)

Since in the absence of a voluntary appearance, the Superior Court of Washington had no jurisdiction in the case of Bell versus The Company, we confidently assert that no jurisdiction was conferred through the appearance made by an attorney under the circumstances disclosed by the record in that case. It certainly cannot be successfully claimed that it was within the scope of the duties, either actual or implied, of Black as an officer of The Company, to authorize the entry of a voluntary appearance in a law suit against The Company, to which he claims there was no defense, for the single purpose of conferring jur-

isdiction in order that the corporation might be deprived of its entire assets for the advantage of himself and his co-defendant Bell. While it might, in a proper case, be within the province of the managing agent of a corporation to employ counsel to represent and defend such corporation in litigation actually pending, we unreservedly assert that no case can be found in the books justifying the conduct of Black in the present instance, nor holding jurisdiction to have been conferred through such a course of procedure, certainly not as against a purchaser with notice. Instead of having acted for the protection of the rights and interest of his corporation, which is the measure and limit of the authority of an agent to act in any situation, Black, by authorizing an appearance for the purpose of conferring jurisdiction in a suit against which he did not propose to defend, thereby voluntarily sacrified rather than protected whatever rights the corporation might have had in the premises.

As just stated, the situation might assume a different aspect were the defendants in the present suit innocent purchasers, and a plausible argument might be made in favor of the jurisdiction which the Snohomish County Court assumed to exercise, but since, instead of being a purchaser without notice, we find the plaintiff in that suit, together with Black, who not only directed the entry of

an appearance under the circumstances related, but who, as the evidence shows, also selected the attorney for the plaintiff, now asserting ownership of the property, as purchasers thereof at a judicial sale had in the proceedings, conceived, fostered and propagated by them in the manner described. Collusion seems to us, therefore, to be the only term by which such conduct can be properly described and it would, it further seems to us, be a travesty on the law and on justice to now permit the respondents, through any technical form, to retain the fruits of such collusion.

Although in some instances, where the proceedings are entirely regular on their face and in the absence of any inducement to unfairness, persons occupying a fiduciary or trust relation may be permitted to purchase the trust property at a judicial sale, yet such purchase in itself is calculated to throw doubt on the fairness of the sale and in the language of the Court of Appeals of Kentucky, quoted with approval by the United States Supreme Court in Schroeders vs. Young, 161 U. S. 340:

> "Public policy and the analogies of the law require that they should be considered *per se* as in the twilight between legal fraud and fairness and should be deemed fraudulent or in trust for the debtor upon slight additional facts."

It is so universally held that fraud, practiced in the act of obtaining or procuring the entry of a judgment, entirely destroys its validity and renders it subject to collateral attack that the citation of authority in support of the proposition would not be in order. This principle is recognized, indeed, in the closing paragraph of the opinion of the trial court (Tr. 86).

It is also very generally held that the unauthorized appearance of an attorney, whereby an apparent jurisdiction is conferred where none would otherwise exist, constitutes a fraud which will render null and void, a judgment thereby obtained, in any court where such judgment may be called in question.

> "The appearance by counsel who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained. An appearance by counsel, under such circumstances, to the prejudice of a party, subjects the counsel to damages, but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle of law which affords him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity and consequently did not authorize the seizure and sale of his property."

Shelton vs. Tiffin, 6 Howard, 162, 186.

"A judgment against a defendant upon an

appearance for him by an attorney of record does not preclude such defendant from showing, in a subsequent proceeding, that the appearance was not authorized."

Hatch vs. Ferguson, 57 Fed, 959, 971.

"Ordinarily the authority of an attorney to appear for the party, whom he professes by the record to represent, is presumed, but such presumption may be overcome by any evidence extrinsic as well as intrinsic."

Dormitzer vs. German Savings & Loan Society, 23 Wash. 195.

The decision of the Washington Supreme Court from which the above is quoted and by which a decree of divorce was held in a collateral proceeding to be of no effect because rendered on an unauthorized appearance of an attorney for the defendant, was subsequently affirmed on writ of error by the Supreme Court of the United States.

German Savings & Loan Society vs. Dormitzer, 192 U. S. 125.

To the same effect:

Mills vs. Scott, 43 Fed. 452.
Graham vs. Spencer, 14 Fed. 603.
First National Bank , Etc., vs. Cunningham, 48 Fed. 510.
Anderson vs. Hawhe, 3 N. E. 566.

Chicago, Etc., R. Co. vs. Hitchcock County, 84 N. W. 97.

National Exchange Bank vs. Wiley, 92 N. W. 582.

Hess vs. Cole, 23 N. J. L. 116.

(C) The record shows (Tr. 120, 121) that on November 30, 1908, in connection with and at the same time of the pretended service of summons, a notice was served on the president of The Company in the State of New York to the effect that at the hour of 9:30 o'clock A. M. on the 9th day of December, 1908, application would be made to the Superior Court of the State of Washington, in and for the County of Snohomish, in the suit brought against it by Frank L. Bell, for the appointment of a receiver. The record, however, does not disclose that any proceedings were had on the date indicated, but on the following day, December 10, 1908, an order was entered, in said cause, appointing John B. Fogarty receiver for The Company and fixing his bond at $1,000. This order (Tr. 125) recites:

> "And it appearing from the files and records herein that due and legal notice of this application, together with a true copy of the summons and complaint herein and of the affidavit used upon this hearing, have been duly served upon the defendant, the Sunset Copper Mining Company, and that no answer, demurrer or objections to this application have

been filed or made"; a receiver is appointed, etc.

Hence, we contend that, since no notice is to be found in the records in said cause that an application for the appointment of a receiver would be made on December 10, 1908, the court order in question is void and carries on its face conclusive evidence of its infirmity, since it is the established rule that where jurisdictional facts are stated in a judgment, others will not be presumed, and if those stated are not supported by the record the court will be held to have acted without jurisdiction.

Galpin vs. Page, 18 Wallace, 350.
Johnson vs. North Star Lumber Co. (9 Cir.), 206 Fed. 624, 629.
Foster vs. Milburn, 202 Fed. 175.

Without the entry of any other or further order of court, said Fogarty proceeded to qualify as temporary receiver and filed a bond in the sum of $1,000, conditioned for the faithful performance of his duties as temporary receiver as required by the order of his appointment (Tr. 127). No further court proceedings were had until January 30, 1909, when, upon the appearance of W. D. Locke as attorney for the defendant company, heretofore discussed, a purported final decree was entered awarding judgment to Bell for the sum of

$37,501.75 with interest and costs, appointing said John B. Fogarty as permanent receiver, and further ordering:

> "That the bond heretofore given herein by the said John B. Fogarty as temporary receiver may be continued and remain in force as his bond, above required, as permanent receiver." (Tr. 132.)

It is our contention that the order of December 10, 1908, appointing a temporary receiver, was absolutely void for two jurisdictional reasons:

1. Because the only notice pretended to have been served or given that an application for the appointment of a receiver would be made, was served outside and beyond the jurisdiction of the Washington court in the State of New York, which, for the reasons heretofore pointed out in connection with the pretended service of summons, was ineffectual for any purpose.

2. For the further reason that even though it should be conceded, for the sake of argument, that a notice of such an application, served in the State of New York, would be sufficient to enable a Washington court to enter a valid order or decree thereon, yet, as above pointed out, the order appointing a temporary receiver was not made until the day following the date indicated in the notice as the time in which such application would

be made. That is, the notice was to the effect that application would be made on December 9th notwithstanding which and without any proceedings on the date indicated the hearing was had and the order was entered on the following day, December 10, 1908.

If correct in either of these contentions, then it follows that all proceedings based upon or connected with said order of December 10, 1908, including the bond of the temporary receiver, were nullities. If the bond given by the temporary receiver was void for that purpose, because based on a void order, then it was void for all purposes, and wholly incapable of being rendered effectual as a valid bond for the permanent receiver by the subsequent order of court entered on January 30, 1909, above quoted.

Again the bond of the temporary receiver was given and conditioned for a specific purpose and should it be conceded that the order, appointing a temporary receiver and the bond given in conformity therewith were valid, yet said bond became *functus officio* when that purpose had been served. Hence, the court was without jurisdiction or authority to extend or continue the obligation of the surety on said bond or to render such surety responsible for the faithful performance of the permanent receiver and the court order by which this was attempted to be done was for this addi-

tional reason a mere nullity. It must, therefore, be held that the receiver assumed to and did act as such in violation of the laws of the state and in like violation of the intention of the court by which he was appointed.

It follows, therefore, that the permanent receiver never qualified by furnishing a bond as required by Section 742 of Rem. & Bal. Codes of Washington, which provides:

> "Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties approved by the court, execute a bond to such person as the court may direct, conditioned that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein."

The decisions are practically unanimous to the effect that where by statute or order of court a receiver, executor, guardian or other similar officer is required to furnish a bond for the faithful discharge of his duties, he is powerless to do any legal act in connection with the estate over which he has been appointed until he has complied with such requirement. The question here presented was before this court in the case of Hatch vs. Ferguson, 68 Fed. 43, wherein it was held that a partition sale of the property of a minor, represented by a guardian who had not furnished a bond in compliance with the statutes of Washington and

the order of the court by which he was appointed, was absolutely void. From the opinion in that case by Judge Gilbert, thoroughly reviewing the authorities, we quote as follows:

> "The probate court, while it is a court of record, with general jurisdiction, acts nevertheless, in the matter of appointing guardians, under a specific grant of power, and exercises a special jurisdiction defined by statute. If the facts do not exist which authorize the action of the court, its action so far is a nullity. * * * Ferguson gave no bond, but proceeded to act as the guardian of the estate of the minor children, and continued so to act until the commencement of the present suit. * * * The questions arise whether he was such guardian, and whether the partition decree and sale are void on account of his failure to give a guardian's bond. * * * Considering the language of the Washington statute, and the purpose which was intended to be subserved by the provision requiring a bond of the guardian before he should assume the duties of his office, we think it the better doctrine to hold that the statute is mandatory, and that the execution of a bond is made a necessary prerequisite to the appointment of a guardian. * * * Notwithstanding the judgment of the probate court appointing the guardian, and the judgment of the Superior Court decreeing and confirming the sale, his acts are void, and may be so declared in any court having jurisdiction of the subject-matter and the parties to the suit. To hold that such defects may be taken advantage of only in direct proceedings is to afford but little protection to the ward whose property

> is being administered. * * * The failure to give a bond, which is by statute made necessary to the creation of the office of guardian, may be considered a jurisdictional defect, which would prevent the nominated guardian from assuming the duties of his office, and the probate court from acquiring, through such guardianship, the control of the ward's estate."

In another federal case, Ritchie vs. Sayers, 100 Fed. 520, a sale of real estate on attachment, made in the absence of a bond required by statute as a prerequisite, was held to be absolutely void and to confer no title on the purchaser. In the course of its opinion the court said:

> "But it is claimed that the circuit court of McDowell county had full and complete jurisdiction over this matter and that that jurisdiction being exercised, it cannot be collaterally attacked. * * * In this case there was an attempt to sue out an attachment, not in accordance with the terms and provision of the statute, but strictly in defiance of the statute. * * * No bond was given, as required by the statute, before the sale was made. The proceedings had under the statute were in derogation of the rights of the party at common law, and it is a well settled and familiar principle that, where a proceeding is founded upon a statute which deprives a party of his common-law rights, every condition or requirement of the statute must be fulfilled and strictly complied with. What protection has a non-resident who owns real estate in our state, if he has no notice of a suit that may be brought against him, and

> if his property is proceeded against for the purpose of collecting either a rightful or an illegal claim, unless the conditions which are precedent to the exercising of these powers which confer jurisdiction upon the courts are complied with? The courts all hold that, where proceedings are instituted under statutes of this character, a failure to comply with the provisions of the statute should be condemned, and the sale of property under such circumstances should be set aside. * * * This whole proceeding was illegal and void, commencing with the decree of the sale, for the reason that such sale was absolutely prohibited until bond was given."

The Supreme Court of California, in the case of Davilia v. Heath, 109 Pac. 893, held that the failure of the plaintiff in a suit for the appointment of a receiver to file an undertaking, as required by the statutes of California, rendered the appointment of a receiver in such suit absolutely void, though the receiver himself had filed a bond in conformity with the statute and the order of his appointment . This holding was affirmed by the Supreme Court of California, in the more recent case of Biby v. Dieter, 113 Pac. 874, in which case it was further held that the appointment of a receiver, void because of the failure of the plaintiff to furnish the bond required by statute, could not be validated by any subsequent proceeding.

That a receiver has no title to the property nor any power or authority to act until he has given

the bond required of him was held by the Supreme Court of West Virginia in Crumlisher's Adm'r. v. Shenandoah Valley R. Co., 22 S. E. 91. See Syllabus 8 and page 104 of the opinion. To the same effect:

Wadsworth v. Connell, 104 Ill. 369;
Stewart v. Bailey, 28 Mich. 251;
Ryder v. Flanders, 30 Mich. 336;
Pryor v. Downey, 50 Cal. 338;
Guynn v. McCauley, 32 Ark. 97;
McKeever v. Ball, 71 Ind. 398;
Wuesthoff v. Insurance Co., 107 N. Y. 580, 14 N. E. 811.

It would seem that no argument should be necessary to demonstrate that under the rule announced in the above cases the receiver's sale in the case at bar must, regardless of all other defects, be held void because of his failure to execute a bond as required by the statutes of Washington.

II.

THE SUPERIOR COURT OF WASHINGTON WAS POWERLESS IN THE FORECLOSURE SUIT OF BELL VS. THE COMPANY TO LEGALLY AUTHORIZE THE SALE OF THE ASSETS OF THE COMPANY BY A RECEIVER.

The complaint in the case of Bell vs. The Com-

pany in the Superior Court of Washington for Snohomish County shows that it was based upon the two mortgages described therein, and that it was brought for the foreclosure of said mortgages against the mining claims of The Company described therein (Tr. 115). While said complaint prayed for the appointment of a receiver to raise "money for the doing of the necessary work in order to hold said mining claims and to watch and care for said property, etc.," said complaint also prayed *"for judgment against said Company foreclosing said mortgages as provided by law."* (Italics ours.) In other words the complaint prayed for the appointment of a receiver *pendente lite* to preserve and protect the property pending the foreclosure proceedings and until the mortgaged property could be sold in the regular course of foreclosure, should the demands of the mortgagee be not sooner or otherwise satisfied. We now propose to show that only in cases of emergency, to care for and protect the property being foreclosed against pending such proceedings and until such property can be sold in the orderly course of foreclosure, can a receiver be appointed in a foreclosure suit under the laws of Washington, and this is the ultimate measure and limit of the authority of a receiver so appointed; that without regard to the questions heretofore urged against the legality of said proceedings, the Superior Court of Washington was powerless to au-

thorize the receiver, appointed in said foreclosure suit, to sell the mortgaged property; that said Superior Court exceeded its jurisdiction in assuming to authorize such sale by the receiver and that the order so issued was for that reason void.

Had Bell not abandoned his foreclosure suit in favor of a receiver's sale The Company, under Sections 594 and 596 of Rem. & Bal. Codes of Washington, would have had one year within which to redeem from the mortgage sale, whereas no such right exists as against a receiver's sale. Of this right, which became a matter of contract at the time of the execution of said mortgages, the court was powerless to deprive The Company.

This question was set at rest in the State of Washington by the decision of the State Supreme Court in the case of Norfer v. Busby, 19 Wash. 450, where it is held that the early territorial statute authorizing the appointment of receiver in a foreclosure suit, having been repealed, the court was without power to make such appointment, since a mortgage in this state is only an incident to and security for the payment of a debt, the title to the property at all times remaining in the mortgagor with the right of redemption in case of foreclosure and sale. In other words, it being the policy of the state, as expressed by legislative enactment, to allow a period for redemp-

tion, an order of court purporting to authorize the sale by a receiver, thereby precluding the right of redemption, is absolutely void.

The concluding sentence of the Busby case, which has only been modified by subsequent decisions to the extent of pointing out when and under what circumstances a receiver may be appointed to take charge of rents, issues and profits and to prevent waste, etc., *pendente lite,* is as follows:

> "When the mortgage is executed, the valuation of the security is made by the respective parties to the contract, and it is also executed in view of the public policy of the state expressed by the statute, and it is evident that the statute cannot be evaded by taking the most valuable incidents of possession from the mortgagor under the guise of rents and profits."

In the case of Union Mutual, Etc., Ins. Co. vs. Union Mills Co., 37 Fed. 286, it was held, with a view to the statutes and laws of Michigan, that since in that state the mortgagor had the right of possession pending a foreclosure suit and until confirmation of the sale, the court was without power to appoint a receiver. We quote from the syllabus in that case as follows:

> "How. St. Mich., Sec. 7847, taking from the mortgagee the right to possession until foreclosure sale is confirmed, and the holding in

> Wagar v. Stone, 36 Mich. 364, that this statute secures to the mortgagor the rents and profits pending foreclosure, constitute a rule governing substantial rights, and not mere matters of practice, *and deprive the federal courts sitting in that state of the power to appoint* a receiver of the rents and profits on the ground that the security is inadequate."

The following excerpt from Wagar v. Stone, 36 Mich. 364, was quoted with approval in Norfer v. Busby, to-wit:

> "The mortgagor being entitled under the statute to the possession and consequently to the rents and profits of the mortgaged premises until such time as his title is divested by a perfected foreclosure, it is not competent to cut short his rights in this regard by means of a receiver appointed in the foreclosure suit."

In the later Michigan case of Hazeltine v. Granger, 7 N. W. 74, also cited in the Busby case, discussing the power of the court to appoint a receiver under a special stipulation therefor contained in the mortgage, it is said:

> "We think the court had no power to grant the order ,which is unprecedented even under the old practice, both for requiring no security and for having no basis of facts to authorize it. The courts in equity have no power to appoint receivers except 'when such appointment is allowed by law.'"

The purpose, force and effect of an Oregon statute concerning the rights of mortgagors in mortgaged property, both before and during foreclosure proceedings, similar in terms and effect to the Washington statute, was considered by the Supreme Court of the United States in Teal v. Walker, 111 U. S. 242, 28 Law Ed. 415, and in holding unenforcible and void a provision in a mortgage intended to defeat the purpose of the statute, it was said:

> "The case of the defendant in error cannot be aided by the stipulation in the defeasance of August 19, 1874, exacted by the mortgagee, that Goldsmith and Teal would, upon default in the payment of the note secured by the mortgage, deliver to Hewett, the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced."

Since, therefore, a mortgagor in the State of Washington retains title to the mortgaged property, coupled with the right of redemption under a statute held to be declaratory of a public policy, which cannot even be bartered away by contract and which, according to the decisions, it is beyond the "power" of the courts to take away, we respectfully contend that the sale of the Sunset

properties by a receiver, appointed in a foreclosure suit, was not merely voidable or irregular, but regardless of all other defects was absolutely void.

While we have found no case where the effect or legality of a sale by a receiver in a foreclosure suit has been questioned on these grounds or under statutes similar to those controlling in this suit, the principles contended for are fully recognized in the above authorities and the courts are unanimous in holding that an order or decree rendered beyond and in excess of the power of jurisdiction of the court is absolutely void and subject to collateral attack, even though the court by which it was entered had jurisdiction of the parties and the subject-matter of the suit.

> "There is a tendency in the latest decisions of the United States to hold that jurisdiction is not only the power to hear and determine but also the power to render the particular judgment entered in the particular case."
>
> 12 *Enc. of Law* (Old Ed.), 246, 247, quoted with approval in *Watkins Land-Mort. Co. v. Mullen,* 54 Pac. 921.

Holding the judgment there in question subject to collateral attack, the Supreme Court of the United States in the case of U. S. v. Walker, 109 U. S. 258, 27 Law Ed. 927, after a thorough discussion of the question, in the concluding paragraph of the opinion said:

> "In this case the statute gave the court power, on the removal of an executor or administrator, to order the assets of the decedent, which might remain unadministered, to be delivered to the administrator *debonis non.* The court made an order directing the delivery of the proceeds of administered assets. This was beyond the power conferred by the statute, and not within the jurisdiction of the court. The order was, therefore, void."

This doctrine was reannounced and affirmed in the case of Neilson, Petitioner, 139 U. S. 176, 33 Law Ed. 118, and Cuddy, Petitioner, 131 U. S. 280, 27 Law Ed. 154.

In the case of Murray v. American Surety Co. of New York, 70 Fed. 341, the Court of Appeals for the Ninth Circuit sustained a collateral attack on the appointment of a receiver for an insolvent bank in a proceeding instituted under a California statute and holding that a receiver so attempted to be appointed was without any power as such, among other things said:

> "The fact that there are other provisions of the Code of California which authorize the court, in other proceedings, to appoint a receiver, cannot be said to authorize the court to appoint a receiver in proceedings instituted under the provisions of Section 11 of the Bank Commissioners' Act. Courts do not make the laws. They interpret them. If there is no warrant in the statute for the doing of an act, courts cannot supply the defect. There is nothing in the contention of counsel for

> plaintiff in error that will 'justify us in interpolating into the statute something that the legislature has omitted.' People's Sav. Bank v. Superior Court of San Francisco, 103 Cal. 33, 36 Pac. 1051. In whatever light this question may be viewed, we are brought face to face with the unquestioned rule of law that in all special statutory proceedings the measure of the court's power is the statute itself. See authorities before cited: Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; East Tennessee, V. & G. R. Co. v. Southern Tel. Co., 112 U. S. 306, 5 Sup. Ct. 168; Jur., Sec. 70; High, Rec., Sec. 43. Whatever steps are provided for by the statute may be taken by the court, and, no matter how irregular or erroneous its action may be in regard thereto, it is conclusive until reversed upon appeal, and cannot be collaterally assailed. Dowell v. Appelgate, 152 U. S. 327, 240, 14 Sup. Ct. 611, and authorities there cited. But the judgment of a court having no jurisdiction of the subject-matter or the parties, or the exercise of a power by the court not authorized by the statute in purely statutory proceedings, is utterly null and void, and may be collaterally assailed."

The Circuit Court of Appeals for the Ninth Circuit in the case of J. P. Jorgenson Co. v. Rapp, 157 Fed. 732, in a suit brought to restrain the enforcement of a judgment awarding relief in excess of and different from that demanded by the pleadings, said:

> "It follows that, as the judgment was not based upon the pleadings or issues in the case and the judgment was contrary to the findings

of fact, the court had no jurisdiction to make and enter the judgment it did in this action. In Black on Judgments the void character of such a judgment is discussed with that author's clearness, in Sections 184, 241, and 242. In the last section the author says:

> *'Besides jurisdiction of the person of the defendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant.'"* (Italics ours.)

To the same effect:

> *Hatch v. Ferguson,* 68 Fed. 43 Ninth Circuit), heretofore quoted.

In Seamster v. Blackstock, 2 S. E. 36, a widow brought suit for the sole purpose of having dower assigned to her out of the estate of her deceased husband. The court, in addition to awarding dower, decreed a sale of the remainder of the lands. In an action of ejectment constituting a collateral attack, it was held that the court, having exceede dits jurisdiction, the sale was absolutely void and of no effect.

The doctrine announced by the Supreme Court of West Virginia in the Seamster case has been reiterated and amplified by the same court in the more recent cases of Heback v. Miller, 29 S. E. 1014, and Waldron v. Harvey, 46 S. E. 603.

In Watson Land-Mort. Co. v. Mullen, 54 Pac. 921, the sale of a homestead by an administrator, under authority of court for the payment of certain debts from which said lands were exempt, was held to be absolutely void because of want of power in the court to order or confirm such sale.

In the case of Sache v. Gillette, 112 N. W. 386, 387, it is said:

> "The mere fact that the court has jurisdiction of the subject-matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. If the court may do so, under the guise of 'jurisdiction of the subject-matter,' then it may commit all sorts of depredations upon the rights of parties, particularly in default cases. * * * Though it has general jurisdiction over the subject-matter, for instance, of actions to foreclose mortgages, to quiet title to real property, or for damages for personal injuries, its power to decide and determine matters in dispute between parties in a given action is limited to those questions which are brought before it by pleadings. * * * When the court goes beyond and outside of the issues made by the pleadings, and in the absence of one of the parties determines property rights against him which he has not submitted to it, the authority of the court is exceeded, even though it had jurisdiction of the general subject of the matters adjudicated. Such a departure cannot be held a mere irregularity.
>
> Although every exercise of power not pos-

> sessed by a court will not necessarily render its action a nullity, it is clear that every final act, in the form of a judgment or decree, granting relief the law declares shall not be granted is void, even when collaterally called in question."

In the case of Knickerbocker Trust Co. v. Oneonta C. & R. S. Ry., 94 N. E. 871, it was held by the Appeals Court of New York that a court of equity had no power to authorize the issuance of receiver's certificates and constitute them a first and prior lien against the property of an insolvent corporation for any purpose other than for the care, maintenance and preservation of the property of such corporation and that certificates issued under order of court for the benefit and advantage of particular claimants or creditors, though same had been issued to and paid for by innocent purchasers, were absolutely void and subject to collateral attack. Speaking through Chief Justice Cullen, the court said:

> "He (the certificate holder) relies on the general rule, often declared, that a judgment or decree of a court which has jurisdiction of the person and subject-matter is binding until reversed, and cannot be attacked collaterally. This general principle may be conceded, and I shall assume, for the argument, that the powers of the court in a sequestration action are as great as those possessed by it in an ordinary equity action, but the general rule quoted is subject to this qualification, * * *

that the court must have power to render the judgment made by it.

The power to issue receiver's certificates paramount to the liens of strangers to the suit is of a strictly limited nature, and the theory on which the existence of power at all is based is clearly stated in two decisions of the United States Supreme Court. * * *

The order made in this case, however, showed on its face that the certificates were to be issued for no such object, but to prevent the foreclosure and loss to the stockholders and creditors of the railroad. Probably payment of the defaulted interest and avoidance of a foreclosure would benefit the stockholders and creditors of the company, and so also would the issue of certificates, the proceeds thereof to be paid to creditors, benefit the creditors; but neither would benefit or enhance the value of the railroad or save it from depreciation to the extent of a dollar, and the railroad was the only *res* in court. Nor would it contribute at all to the proper operation of the railroad, the thing in which the public was interested. The effect of the order was simply to pay bondholders by appropriating against their will part of their own property for the purpose.

The order of the court was therefore not only erroneous, but void as in excess of its power; and, though the court in granting the order necessarily decided that it was within its powers, still the order may be attacked collaterally." (Italics ours.)

To the same effect, 25 Cyc. 684, 1074, and 24 Cyc. 72.

While the complainant in the Snohomish County case prayed the appointment of a receiver, the action was, nevertheless, for the foreclosure of a mortgage, and under the statutes and established law of this state, as declared by its highest court, the Superior Court had no power or jurisdiction to depart from the orderly and established practice in foreclosure proceedings and was likewise without power or jurisdiction to authorize a sale of said property by a receiver. The fact that such relief may have been demanded in the complaint did not confer any additional authority on the Superior Court, since the legal aspects of the situation were in no way changed nor the power of the court enlarged by a demand for relief, which the court could not legally grant.

III.

THE PROCEEDINGS LEADING UP TO AND INCLUDING THE RECEIVER'S SALE OF THE ASSETS OF THE COMPANY BEING VOID, THE SUBSEQUENT ORDER OF CONFIRMATION ENTERED BY THE SUPERIOR COURT IN SAID PROCEEDINGS WAS INEFFECTUAL TO RENDER VALID THAT WHICH WAS NULL AND VOID FROM THE BEGINNING AND IS NOT RES JUDICATA OF THIS SUIT.

That a void judicial sale cannot be rendered

valid or legal by a subsequent confirmation is the universal holding of the courts.

In the case of Shriver's Lessee v. Lynn, *et al.*, 2nd How. 43, 11 Law Edition, 172, it is said:

> "The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court—nothing on which its judgment could rest."

The Supreme Court of the United States in the case of Gaines v. New Orleans, 73 U. S. 642, 18 Law Ed. 950, affirmed the rule just stated, saying:

> "A kindred defense to this is, that the probate court of New Orleans, in 1841, duly approved of the sales made by Relf and Chew as executors, and that this homologation is binding upon the complaint. * * * If it were true the accounts were duly homologated, these defendants are not benefited by it, because the probate court could not by a subsequent order give validity to sales made by executors, which were null and void by the law of the state when they were made."

In Lemaster v. Keeler, 123 U. S. 376, 31 Law Ed. 238, said rule is again reiterated with emphasis by Justice Field in the concluding paragraph of the opinion where it is said:

> "The confirmation of the sale by the order

> of the court did not cure the invalidity of the execution upon which it was made. The extension of the judgment against Young, so as to embrace the sureties, being a void proceeding, no subsequent action upon the sale could give it validity. A confirmation of a sale may cure mere irregularities not affecting its fairness, but not an infirmity growing out of the nullity of the judgment under which it was had."

The rule stated has been recognized and applied by the Supreme Court for the State of Washington in no uncertain fashion. In the case of Vietzen v. Otis, 46 Wash. 402, 407, speaking through Justice Rudkin, now of the Federal Bench, the court said:

> "Was the defect in the sale cured by the direction contained in the decree of foreclosure that it should be so made, or by the subsequent order of confirmation? We think not. * * * Under the express provision of our statute and numerous decisions of this court, irregularities in the manner of conducting sales are the only defects cured by confirmation. We hold, therefore, that the sale in question was utterly void in its inception, and remains so notwithstanding the direction in the decree of foreclosure and the order of confirmation."

On this point Vietzen v. Otis was affirmed by the same court in the later case of McLiesh v. Ball, 58 Wash. 690.

Should this court adjudge void the sale of the

assets of The Company and the confirmation thereof, then must fall, without further argument, the holding of the lower court that the order of confirmation entered over the objection of certain stockholders, not including this appellant, is *res judicata* of this suit and estops appellant from further attacking or questioning the validity of those proceedings. In other words, since a void judgment is ineffectual for any purpose, inadmissible in evidence and not in fact a judgment at all, it follows that no estoppel can arise against this appellant from the action of other stockholders in presenting objections with a view to preventing the court from further encumbering the record with void proceedings. Under the above cited authorities the order of confirmation did not cure the jurisdictional defects in the prior proceedings and was itself void, hence, the attempt of certain stockholders to prevent the error subsequently committed cannot prevent an attack upon nor infuse legality in that which was void from the beginning.

Again, it is obvious that many elements of the cause of action set up in the bill of complaint herein were not and could not have been put at issue by objections to the confirmation of said sale. For illustration, the contention that a trustee of a corporation cannot at a judicial sale, under the circumstances here presented, become the purchaser of the assets of his corporation and hold

them adversely to the corporation for his own individual use and benefit, could not possibly have been presented at that time since the presumption was that Black would be faithful to his trust and that he had purchased for the use and benefit of the corporation whose best interests it was his duty to protect. Furthermore, the confirmation was subsequent in time to the overruling of said objections and with the confirmation of the sale an entirely new element was injected into the controversy, and on the assertion by the purchaser of personal ownership the rights of The Company and its stockholders were placed in jeopardy from an entirely new quarter.

> "A judgment is not and cannot be an estoppel as to facts which did not occur until after the judgment was rendered and which were not involved in the suit in which it was rendered."
>
> 23 *Cyc.* 1315.

Stated in another way, it is sought in this action to hold appellees as trustees of a constructive trust:

First: Because all the proceedings leading up to and including the confirmation of the sale by virtue of which they became the paper owner of said assets are absolutely void and without force or effect for any purpose; and,

Second: That regardless of the validity of said court proceedings, Black as trustee and general

manager was and is incapable, under the circumstances here disclosed, of purchasing and holding said assets adversely to The Company, and that because of the obvious collusion between Black and Bell whereby the sale was brought about, Bell must also be held to the same standard of accountability.

IV.

BLACK BEING A TRUSTEE AND THE GENERAL MANAGER OCCUPIED A FIDUCIARY RELATION PREVENTING HIM FROM PURCHASING, AT THE RECEIVER'S SALE, AND HOLDING ADVERSELY THE ASSETS OF THE COMPANY AND BELL IN CONSEQUENCE OF HIS CO-OPERATION AND OBVIOUS UNDERSTANDING WITH BLACK IS SUBJECT TO THE SAME RULE.

That a trustee and managing officer of a corporation occupies a fiduciary relation and is for such corporation a trustee in fact, is too well established to justify discussion. It is also well established that because of such trust relation he is required to have in mind at all times the promotion of the best interests of his *cestuis que trust,* the corporation and its stockholders. He is strictly forbidden to profit at the expense of the corporation and, though he may contract with the corporation when clearly for its best interests, he

cannot take advantage of a financial embarrassment of the concern whose interests he is required to promote by becoming a purchaser on his own account of the assets of such corporation at a judicial sale brought about in consequence of the unprosperous and tangled condition of its business affairs. This general doctrine is universal and the failure of its application the infrequent exception.

Concerning the status of a trustee of a corporation under the laws of Washington, the Supreme Court of this state in the case of Parsons v. Tacoma Smelting Co., 25 Wash. 492, said:

> "The ordinary obligations attending trust relations attach to the trustee of a corporation. The policy of the law forbids the trustee to assume a double function where there are adverse interests considered."

The case of Coombs v. Barker (Mon.), 79 Pac. 1, presents a state of facts similar in many respects to those involved in the case at bar and in the course of a lengthy and an exceptionally well considered opinion, it is said:

> "The objects of the suit are to have a certain redemption by the directors of the Montana Gold, Silver, Platinum & Tellurium Mining Company from an execution sale of the property of said company declared to have been made in favor of the company and its stockholders, to have the individual defend-

ants who obtained the sheriff's deed to the property declared trustees of said property, to obtain an accounting by such defendants of the proceeds of said property while in their possession, to quie title to the property, and for general relief. * * * Directors of a corporation stand in equity in a fiduciary capacity as to the corporation and stockholders. Whether they should be treated as trustees for such stockholders or company, in the full sense of that term, is immaterial. Standing in a fiduciary capacity, they are not allowed to profit by virtue of their position. They must exercise the utmost good faith in all transactions touching their duties to the corporation and its property. All their acts must be for the benefit of the corporation, and not for their own benefit. If by their acts the directors have received any profits from the company's property or business, they hold the same as trustees for the benefit of the corporation and its stockholders. Illustrations of this doctrine are very numerous, and the principles are so well established that citation of authorities seems unnecessary. Our own court, speaking through Mr. Associate Justice Buck, in the case of Gerry v. The Bismarck Bank, 19 Mont. 191, 47 Pac. 810, announces this principle in the following commendable language: 'That a trustee should not be allowed to profit by his trust is a well-known fundamental doctrine of equity. No evasions, no technical subtlety of reasoning, no empty distinctions, should be tolerated when the assertion of this principle becomes necessary. It is true that when the motives of a trustee in the neglect of his duty are not essentially bad, or are readily reconcilable with ordinary honesty of purpose, certain courts

have applied this rule leniently. It is true that weak toleration from the bench of frail, but penitent, humanity, has often apparently robbed the principle of its very life. But such precedents serve only to increase plausible devices for evading its consequences. They encourage the natural tendency of designing selfishness to substitute the vague expression 'business enterprise' for 'business honesty.' * * * It is also important to notice the method by which these directors acquired the right to become redemptioners. The redemption was made under a judgment rendered in favor of one of their number only two days before the redemption, which was obtained by default based upon the acceptance of service of the summons by another of their number. These facts render it too doubtful for this court to hold that the entire proceeding was open, above-board, fair, and equitable. * * * We therefore advise that the decree of the lower court be reversed, and that the court be directed to enter a final decree * * * declaring and adjudging that the redemption of the company's property made by them or their predecessors in interest was made for the benefit of the defendant mining company, and that they hold the legal title to all of said property in trust for said company; that they reconvey the same to said company, and that said company's title thereto be quieted as against said defendants. * * * Counsel for defendants claim that there is no fraud in fact alleged against defendants in the complaint. Whether this is true, we deem immaterial. A breach of official duty on the part of the defendant directors is clearly alleged and relied upon. This is a fraud in law, and sufficient to warrant relief if proven. It is

> very difficult to distinguish the effect of fraud in fact from the effect of fraud in law. Usually the two classes concur in their effect. It is the same. * * * Proof of either class of fraud is sufficient to warrant relief. Therefore allegations and proof of a breach of official duty are all that is necessary."

In Fagan v. Stuttgart Normal Institute (Ark.), 120 S. W. 404, the doctrine is expressed in the following language:

> "A director cannot, as a general rule, make a valid purchase of the property of the corporation at a public or judicial sale. He may become a creditor of the corporation, if the transaction is open and *bona fide,* and in such event, to protect himself, he may purchase at a judicial sale, but if he purchases at such a sale to satisfy the claim of another, his purchase, in equity, is subject to be set aside at the instance of a party in interest. He is considered in equity as being a trustee for the stockholders and creditors of the corporation, and his position as a bidder is inconsistent with that relation. His appearance as a bidder may have the effect to prevent bidding, and his private interest may conflict with his duties as a trustee of the corporators, in protecting their interests. The rule, as sustained by sound moral principles and the weight of authority, is that, where a director purchases at a judicial sale the properties of the corporation, he does so subject to the right of the corporation or its stockholders to disaffirm the sale and to demand a resale without showing any actual fraud or any actual prejudice."

The Supreme Court of California had this question under consideration in Smith v. Pacific Vinegar & Pickle Works, 78 Pac. 550, and we quote the following brief excerpt from the lengthy opinion of the court:

> "Broadly stated, the legal proposition insisted on by appellant is that one occupying a fiduciary or trust relation to a corporation cannot, while such relation exists, enter into any express contract with himself individually relative to the trust property which will be binding on the corporation; that such a contract is a breach of trust, and voidable at the mere election of the corporation, if not absolutely void; and that, when such a contract is sought to be enforced, the court will not permit any investigation as to the fairness or unfairness of the transaction, nor will it permit the trustee to show that it was not detrimental, or that it was even advantageous to the beneficiary."

The New York Court of Appeals in Billings v. Shaw, 103 N. E. 142, had this to say in affirming and applying the doctrine contended for on behalf of appellant:

> "Directors of corporations act in a fiduciary capacity. In every action where the interest of the corporation is involved, particularly where the same is in conflict with the individual interest of the directors, they act as trustees and are strictly accountable to the creditors or stockholders of the corporation for their action."
>
> "It was stated by this court in substance in Munson v. Syracuse, Geneva & Corning

R. R. Co. (103 N. Y. 58) that all acts of a director in his own behalf when his personal interest is in conflict with that of the corporation are invalid at the election of the corporation. The court say (p. 74): 'The law permits no one to set in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. * * * The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating without attempt at discrimination, all transactions in which they assume the dual character of principal and representative.' "

See, also, for full discussion of the question:

10 *Cyc.* 814, 815;

Cook on Corporations (6th Ed.), Secs. 648, 853;

Pomeroy's Equity, Secs. 958, 1052;
21 *Ency. of Law,* 904;
Thompson on Corporations, Sec. 4171;
Tobin v. Frazier, 17 S. W. 25, 28;
Collins v. Hoffman, 113 Pac. 625.

The principle is announced in nearly all the above citations that by the mere fact of purchase a presumption is raised that the property is taken for the benefit of the corporation and while circumstances may exist in special cases permitting a director to purchase for his individual use, the presumptions are to the contrary. The burden is on such director to show *bona fides* and establish such special circumstances as would permit him to take and hold the corporate property in opposition to the corporation. This we confidently assert has not been done in the present instance. The evidence shows, on the other hand, a collusive intimacy between Black, a trustee, and Bell, a mortgagee, and some time attorney for the corporation, the purpose and final result of which was the joint acquisition by them of the entire assets of The Company, and whether the fraud be considered as actual or constructive and without regard to the regularity of the proceedings discussed under previous heads, appellees cannot now be permitted to retain the assets of The Company thus acquired in violation and disregard of fiduciary relations.

In closing the discussion under this head and as strongly tending to show that the foreclosure suit was conceived and instituted for the single purpose of enabling Black and Bell to acquire the assets of The Company without any regard whatever for the rights of the stockholders, we desire to call attention to the fact that the record in said foreclosure suit does not show that the receiver ever made a final report and though he claims to have received $2000 in cash from the sale of the property in controversy no showing is made as to the disposition thereof, nor does the record in that case show that further proceedings of any kind were ever had in said suit subsequent to the confirmation of the receiver's sale.

This anomalous situation is worthy of serious consideration in connection with all the other circumstances surrounding the institution and progress of said suit, and to our mind strongly tends to show fraud and collusion in the premises.

V.

THE CAUSE SET FORTH IN THE BILL OF COMPLAINT IS NOT BARRED BY ANY STATUTE OF LIMITATION OR BY LACHES.

That the jurisdiction of and practice in the federal equity courts is uniform throughout the

United States and not subject to restriction by the local statutes of the state in which the court may sit nor by the construction placed thereon by the local tribunals is, of course familiar law to this court. It is likewise fundamental law that federal equity courts will in all character of cases refuse to be absolutely bound by state statutes of limitations. In many instances they interfere for the express purpose of preventing an equitable claim from being barred by an inequitable application of the statutes, while in other cases, entirely free from fraud or any breach of a fiduciary relation, courts of equity will sometimes adopt the statutory period as the time beyond which the injured party will be deemed to have slept on his rights. Briefly stated, federal courts of equity endeavor to ascertain the facts in each case with a view to determining whether the complainant has been guilty of such laches as to bar recovery.

The distinguishing features between the doctrine of laches and statutes of limitation is well described in Galiher v. Cadwell, 145 U. S. 368, 36 Law Ed. 738, as follows:

> "Laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting a claim to be enforced — an inequity founded upon some change in the condition or relations of the property or the parties."

This rule has probably been applied more frequently in the matter of the enforcement of constructive trusts than in any other connection.

> "Where the trust sought to be enforced is constructive and arises out of the fraud of the alleged trustee, the question as to what time will constitute a bar is peculiarly within the equitable discretion of the court, to be decided in each case according to its nature and circumstances, subject to the qualification that diligence must be used to establish the trust, and that equity will not aid a party where the demand is stale or where there has been long acquiesence in the wrong."
>
> 15 *Am. & Eng. Ency. Law*, 1206.

In the leading case of Michoud vs. Girod, 4 How. 504, 561 (11 Law Ed. 1076, 1102), a proceeding to enforce a constructive trust, it is said:

> "Although the statutes of limitations do not apply to any equitable demand, courts of equity adopt them; or at least generally take the same limitations for their guide, in cases analagous to those in which the statutes apply at law. (10 Ves. 467; 1 Cox., 149.) Still within what time a constructive trust will be barred must depend upon the circumstances of the case. (Boone vs. Chiles, 10 Peters, 177.) There is no rule in equity which excludes the consideration of circumstances, and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or

> within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

Discussing the effect of statutes of limitation in equity cases in the federal courts, in Sullivan vs. Portland Etc. R. Co., 94 U. S. 806, 24 Law Ed. 324, Justice Swayne said:

> "Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar; it is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly."

The rule announced in the above authorities was applied by this court in Northern Pac. Ry. Co. vs. Boyd, 177 Fed. 804, 823, where it was held that a delay of twenty years was not a bar to the granting of the relief prayed.

Speaking through Justice Gilbert, it was said:

> "The doctrine of laches rests upon equitable principles which are neither arbitrary nor technical, and what amounts to laches depends largely upon the circumstances of each particular case. The ultimate inquiry is on which side would fall the balance of justice in sustaining or denying the defense. The important elements to be considered are the length of time which has elapsed, the nature

> of the acts which have been done in the meanwhile, the knowledge which the complainant had of the fraud which he charges, and the time when he acquired that either and the change in the situation during neglectful repose either as to the loss of evidence which would have been available to the defendant or the advance in value of the property which may be the subject of the suit."

The opinion of this court in the Boyd case was affirmed by the Supreme Court of the United States in the 228 U. S. 482, where in rejecting the contention of the Railroad Company, that Boyd was barred by the lapse of time, Justice Lamar said:

> "Lastly, it is said that Boyd was estopped from attacking, in 1906, a reorganization completed in 1896, and, ordinarily, such a lapse of time would prevent any creditor from asserting a claim like that here made. For along with the policy to encourage reorganizations goes that of requiring prompt action by those who claim that their rights have been injuriously affected. The fact that improvements are put upon the property—that the stock and bonds of the new company almost immediately became the subject of transactions with third persons — calls for special application of the rule of diligence. But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the nonaction of the complainant operated to damage

the defendant, or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time."

For the application of the rule of laches as distinguished from statutes of limitations see also:

Kirby vs. Lake Shore Etc. R. R. Co., 120 U. S. 130, 30 Law Ed. 569;
Stearns v. Page, 7 How. 819;
Gladden v. Kimmel, 99 U. S. 202;
Payne v. Hook, 74 U. S. 430;
Stevens v. Grand Central Mining Co., 133 Fed. 28;
Burns v. Copper, 140 Fed. 279;
Davis v. Louisville Trust Co., 181 Fed. 22;
16 *Cyc.* 152, and cases there cited;
Street's Federal Equity Practice, Secs. 211, 212.

We desire to call the court's attention especially to the case, above cited, of Stevens v. Grand Central Mining Co., 133 Fed. 28. This was a suit similar in many respects to the case at bar and was brought to enforce a constructive trust approximately ten years after patent to certain claims had been fraudulently issued. The opinion by Justice Van Devanter contains an exhaustive discussion of the question here presented.

The order confirming the receiver's sale was made and entered on April 5th, 1909 (Tr. 165,

166), the bill of complaint herein was filed and subpoena issued on March 26th, 1912 (Tr. 20), less than three years after the entry of said order of confirmation. Section 159 of Remington & Ballinger's Codes and Statutes, allowing three years for the institution of an action based on fraud, would control this proceeding were it an action at law. As just stated this suit was brought within the three year period.

This, however, is a purely equitable case, and, measured by the rule of the above decisions, the defendants have not, we submit, set up in their respective answers any facts to justify the court in holding that the appellant has been guilty of laches. The property is still in the hands of the appellees and the bill of complaint prays for the appointment of a receiver to the end that equity may be done in the premises between all the parties concerned. The record does not disclose that there has been any change in the affairs of the parties or the condition of the property that would warrant the court in holding that in equity and good conscience the stockholders of The Company are now barred from demanding relief. No condition is shown that would prevent a receiver, under the direction and guidance of a court of equity from doing justice between all the parties concerned. Surely it cannot be conscientiously said, under the circumstances here presented, that because of a de-

lay of less than three years, in equity and justice the complainant should not be permitted to come in and lay bare the fraudulent transactions and breaches of trust and confidence whereby The Company and its stockholders have been deprived of their property.

In view of the foregoing the decree appealed from should be reversed with instructions to the lower court to enter a decree pursuant to the prayer of the bill of complaint.

Respectfully submitted,

O. C. MOORE *and*
GEORGE H. WALKER,

Solicitors and Counsel for Appellant.